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In the Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE DUNBAR PREWITT, JR., PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In 1981 petitioner successfully sued respondent for handicap discrimination in violation of the Rehabilitation Act. Petitioner now contends that the court of appeals erred in refusing to award him additional back pay, as well as costs and interest. He also contends that the court of appeals erroneously sanctioned him under Fed. R. App. P. 38.

1. Petitioner is a disabled veteran. In 1981, after respondent denied his application for employment as a clerk/carrier at the Greenville, Mississippi post office, petitioner brought an action charging respondent with handicap discrimination, in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* The district court granted respondent's motion for summary judgment. The court of appeals reversed, ordering further proceedings on the merits of petitioner's claim. See *Prewitt* v. *United States Postal Service,* 662 F.2d 292 (1981) (*Prewitt I*).[1]

[1] Petitioner also brought a parallel action against respondent. In it, he alleged that respondent had engaged in handicap discrimination when it denied his application for employment as a substitute rural carrier at the Greenville, Mississippi post office. The district court

The district court on remand upheld petitioner's discrimination claim. It awarded him backpay and assigned him to his desired position with retroactive seniority, but rejected his claim for interest on his backpay award (Pet. App. A4, A20-A21). Petitioner appealed and respondent cross-appealed. The court of appeals, in an unpublished opinion (*Prewitt* v. *United States Postal Service*, No. 85-4006 (June 26, 1985) (*Prewitt III*)), affirmed the district court's decision on all issues raised by petitioner. On respondent's cross-appeal, however, the court set aside the district court's backpay calculations. At approximately the same time, in a related appeal pressed by petitioner, the court of appeals concluded that petitioner had "received at the hands of the trial court all the relief to which he [was] properly entitled" (*Prewitt* v. *United States Postal Service*, 754 F.2d 641, 641 (1985) (*Prewitt IV*)). The court found that petitioner's additional claims "st[ood] at the gate of the realm of fantasy." And it held that "[f]urther frivolous demands * * * may subject [petitioner], even as a *pro se* litigant, to sanctions for vexatious multiplication of litigation." *Ibid.*

2. On remand from the court of appeals' decision in *Prewitt III*, the district court in the instant phase of the litigation reconsidered the time period for which petitioner would receive backpay and recalculated the amount of the award (Pet. App. A5-A6). Petitioner moved for relief from judgment under Fed. R. Civ. P. 60(b)(6), and the district court denied relief (Pet. App. A16-A22). The court rejected petitioner's demand for $200,000 in "agent's fees," characterizing that claim as "an attempt to circumvent earlier rulings of this Court and the Court of Appeals" de-

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dismissed that complaint; the court of appeals vacated and remanded with directions that the case be stayed until petitioner had exhausted his administrative remedies. See *Prewitt* v. *United States Postal Service*, 662 F.2d 311 (5th Cir. 1981) (*Prewitt II*). The instant petition does not address the merits of that action.

nying similar requests (*id.* at A18-A19). The court also rejected petitioner's claim for pre- and post-judgment interest, noting that that claim had "already been determined in this case" (*id.* at A20).

3. The court of appeals, in an unpublished opinion, unanimously affirmed (Pet. App. A1-A15). It agreed with the district court (*id.* at A6-A8) that petitioner was neither entitled to renew his claim for interest on the judgment nor entitled to demand that his backpay award include retroactive annual leave, sick leave and other benefits. Each of these claims, the court observed (*id.* at A7), "either ha[d] been raised before and settled by a decision of this Court, or [had been] waived for failure to raise before the district court." The court then upheld (*id.* at A9-A10) the district court's backpay calculations, which were the subject of the remand in *Prewitt III*.

Finally, the court of appeals assessed double costs as sanctions against petitioner (Pet. App. A10-A15). The court found (*id.* at A10-A11) that petitioner's "actions throughout this case have been characterized by the filing of ridiculous and frivolous claims and motions which the government has had to counter." The court acknowledged that petitioner's "narrow appeal on the two issues which had been remanded to the district court were properly subject to appeal" at this stage of the litigation (*id.* at A11). But the court determined that the balance of the appeal was frivolous, in that petitioner had raised the same claims at earlier stages of the litigation (*ibid.*). Noting that petitioner had been cautioned before about his persistent, frivolous motions, the court concluded that under Fed. R. App. P. 38 the sanction of double costs was appropriate (Pet. App. A12).[2]

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[2] The court also noted that throughout the litigation petitioner had "cast personal aspersions upon government officials involved and upon the district courts and district judges" for which there was "not the slightest support in the record" (Pet. App. A12).

4. Petitioner first contends (Pet. 9-11) that he should be granted additional backpay for the period between 1983 and 1985. The district court, in a prior order of December 1985 (Pet. App. A23-A29), held that petitioner had waived this claim by failing to raise it in the proceeding to determine the scope of the backpay award (*id.* at A24-A26). Petitioner concedes (Pet. 10) that he neglected to raise the issue at the appropriate time but he asks this Court to excuse his neglect. There is no reason to do so.

5. Petitioner next asserts (Pet. 12-24) that he was entitled to a plenary hearing on remand from *Prewitt III* to determine the amount of the backpay award, and that the district court erred in resolving that issue on the basis of affidavits. The court of appeals could find "no support for th[at] procedural claim[]" (Pet. App. A10), and petitioner does not offer any. Indeed, Fed. R. Civ. P. 43(e) expressly provides that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties." Petitioner does not explain why that rule should not be applied to him.

6. Petitioner also asks the Court to resolve a conflict in the circuits on the liability of the Postal Service for interest on certain backpay awards. There is, to be sure, disagreement among the circuits on whether interest is available against the Postal Service on backpay awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[3] But in this case the court of appeals, in its unpublished opinion, explicitly refused to reach that issue.

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[3] Compare *Nagy* v. *United States Postal Service*, 773 F.2d 1190, 1192-1193 (11th Cir. 1985) (Postal Service is liable for interest on backpay award under Title VII), with *Loeffler* v. *Tisch*, 806 F.2d 817, 818 (8th Cir. 1986) (sovereign immunity bars an award of prejudgment interest on Title VII backpay award). See also *Hall* v. *Bolger*, 768 F.2d 1148, 1151-1152 (9th Cir. 1985) (postjudgment interest is available on award of attorney fees against the Postal Service).

The court held that it had rejected petitioner's claim for interest in a prior appeal (Pet. App. A7-A8). There, too, the court rejected petitioner's claim without expressly discussing its merits. Because the court of appeals has thus not in terms addressed the merits of petitioner's interest claim, this case is an inappropriate vehicle in which to resolve the conflict among other circuits on the issue.[4]

7. Finally, petitioner challenges (Pet. 35-42) the court of appeals' refusal to grant him additional backpay and its decision to sanction him with double costs. Petitioner asserts that in making these rulings the court penalized him for his "exercise[] [of] his first amendment right to say that some members of the judiciary and the staffs therein are racist in their dispositions" (Pet. 35). That assertion is frivolous. The court of appeals did not reject petitioner's claim for additional backpay because of his intemperate outbursts; it rejected that claim because it was untimely (see Pet. App. A7). And the court acted well within its discretion in imposing sanctions under Fed. R. App. P. 38. See *225 Broadway Co.* v. *Sheridan*, 807 F.2d 24, 26 (2d Cir. 1986); *Scarpa* v. *Murphy*, 806 F.2d 326, 329 (1st Cir. 1986); *Harrison* v. *Commissioner*, 805 F.2d 973, 974 (11th Cir. 1986); *Stafford* v. *Commissioner*, 805 F.2d 895, 896 (10th Cir. 1986); *In re American President Lines*, 804 F.2d 1307, 1310 (D.C. Cir. 1986).

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[4] Petitioner raised an identical claim for interest in an earlier petition to this Court. In *Prewitt* v. *United States Postal Service*, No. 85-5150 (Oct. 7, 1985), petitioner sought review of the court of appeals' decision in *Prewitt IV*. Petitioner also moved for leave to proceed in forma pauperis. This Court denied the motion and granted petitioner additional time within which to pay the required docketing fee and submit a petition in compliance with the Court's rules. Petitioner apparently did not file a new petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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